No. 88-864

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1988

JOSEPH STOUT and BARBARA STOUT,

Petitioners,

v.

A.M. SUNRISE CONSTRUCTION COMPANY, INC., and COLE & ASSOCIATES, INC.,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA AND THE INDIANA COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether dismissal of a plaintiff's complaint as a sanction for allegedly failing to comply with a discovery order is a denial of due process where the defendants hid documents which the plaintiff needed for compliance and harrassed the plaintiff's expert so that he withdrew from the case?

2. Is it a denial of due process to dismiss a complaint as a sanction for noncompliance with a discovery order where no finding was made that plaintiff's alleged failure was willful or in bad faith, and where defendants were not prejudiced because the information had already been provided except for plaintiffs' expert's opinion and the underlying technical data needed by plaintiff's expert to give his opinion was in the documents defendants had hidden — and thus already had within their knowledge and control?

3. Is it a denial of due process where the plaintiff, a paraplegic, suffers dismissal of his complaint for the alleged failure of his counsel to make adequate responses to interrogatories and the plaintiff is totally blameless?

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v.

A.M. SUNRISE CONSTRUCTION COMPANY, INC., and COLE & ASSOCIATES, INC.,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA AND THE INDIANA COURT OF APPEALS

Joseph Stout and Barbara Stout respectfully petition this Court for a writ of certiorari to the Supreme Court of Indiana and the Indiana Court of Appeals to review the decision of the Indiana Court of Appeals and the decision of the Supreme Court of Indiana refusing to accept their Petition to Transfer.

OPINIONS BELOW

The dismissal orders of the Superior Court of Lake County, Indiana, are set forth in Appendix A (*infra*, pp. A-1 through A-2). The opinion of the Court of Appeals of Indiana, Fourth District, one judge dissenting as to

one defendant, is reported at 505 N.E.2d 500 (Ind. App. 1987) and set forth in Appendix B (*infra*, pp. B-1 through B-8). The denial of Petitioners' Petition to Transfer by the Supreme Court of Indiana, by a three to two vote, is set forth in Appendix C (*infra*, p. C-1).

JURISDICTION

The order of the Supreme Court of Indiana, denying Petitioners' Petition to Transfer, was entered on August 23, 1988. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. §1257(3) (1982).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT XIV.

§1 Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petition stems from a trial court's dismissal of Petitioners' cause of action as a sanction for their failure to provide more complete answers to a handful of interrogatories.

On October 3, 1977, Petitioner Joseph Stout ("Stout"), a journeyman ironworker, was working on a crew that was erecting the steel superstructure of an elementary school. While sitting atop a cross beam so as to secure it to a vertical steel column, the steel column collapsed. Stout rode the falling cross beam approximately fourteen

feet to the ground. His head cracked open; his back broke in three places; and he suffered spinal cord damage. Stout was rendered a paraplegic.

On October 3, 1979, Stout and his wife, Barbara, filed a personal injury action in the Superior Court of Lake County, Indiana. They named the general contractor, A.M. Sunrise Construction Company, Inc. ("Sunrise"), the architectural/engineering firm that designed the building, Cole & Associates ("Cole") and the owner/lessor of the crane used at the site, Central Rent-A-Crane ("Central"), as defendants. Defendants answered the complaint and Sunrise and Central filed third-party actions against Stout's employer, C & C Iron, Inc. ("C & C").

Almost from the beginning of the litigation all parties were dilatory in complying with discovery requests. On May 2, 1980, Stouts served interrogatories and production requests on Sunrise and Cole.[1] Neither defendant filed timely replies. On June 30, 1981, Stouts moved to compel their responses. Pursuant to court order, Sunrise eventually complied on August 13, 1981; Cole filed unsigned answers to the interrogatories and objected to the production request.

On November 12, 1981, without ever having served any discovery requests on Stouts, whatever, Cole filed a Certificate of Readiness, therein certifying that discovery was complete; there had been reasonable disclosure of the contentions by the parties; and that it was ready for trial. Central was not ready for trial, however. It served another set of interrogatories on Stouts, twenty five in number, all asking for Stouts' contentions as to

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[1] Prior to this time, Sunrise Central and C & C fought amongst themselves. Also Stouts had already answered 89 interrogatories (with 295 subsections) propounded by Central.

Central's negligence. Stouts did not respond. Discovery had shown that neither the crane nor its operator were responsible for the accident. Central then moved for dismissal. Stouts did not object and on October 21, 1982, Central was dismissed with prejudice.

Apparently Cole re-examined its position during this time. On May 21, 1982, Cole filed its first set of interrogatories on Stouts. In September of 1982, Cole moved for sanctions for Stouts' failure to respond, but it did not seek a ruling on this motion. Almost two years later, in May of 1984, Cole renewed the motion. After obtaining an extension of time to answer, due to Stout's having suffered a heart attack, Stouts filed timely answers on August 8, 1984. Cole had no complaint with these answers. On July 24, 1984, the matter was set for pretrial on May 31, 1985, and for trial, the week of July 8, 1985. No discovery cutoff date was established.

On August 15, 1984, Cole filed a second set of interrogatories on Stouts, seventeen in number. Some called for technical information. Stouts informed Cole they wanted to take the deposition of its structural engineer on the project. Cole gave them an evasive and inaccurate (if not knowingly false) address for the engineer, necessitating Stouts' hiring of a skip tracer to find him. On January 8, 1985, Stouts, without benefit of the project engineer's deposition, answered Cole's interrogatories. On January 15, 1985, Cole moved for more complete answers to all but three.

On January 23, 1985, six years into the litigation, Sunrise filed its first set of interrogatories on Stouts.

Stouts made an all-out attempt to obtain outstanding discovery from Cole and Sunrise. On February 6, 1985, they filed a motion to compel responses to old production requests, new production requests, supplemental interrogatories and a motion for an *in camera* inspection of

documents Cole had previously refused to produce. Their expert had told them that he needed certain technical documents, e.g. structural calculations, shop erection drawings, concrete pour documents, to form opinions as to the cause of the steel's collapse.

The court ordered defendants to produce the requested documents and answer the outstanding interrogatories. Cole's counsel represented in open court that he did not have the documents. Counsel for Sunrise likewise told the court that he had never possessed them.

The court also ordered Stouts to file revised answers to five of Cole's interrogatories and to disclose the name of their expert by March 4, 1985. Stouts disclosed their expert on the spot. Within days, counsel for Sunrise telephoned Stouts' expert and informed him that his client's insurance carrier had engaged the expert in another pending case so that the expert had a conflict of interest. Thereupon, the expert withdrew, citing "business reasons." The court gave Stouts an additional two weeks (till March 18, 1985) to find a new expert and file revised answers to Cole's interrogatories. During this time period defendants still did not comply with outstanding discovery requests.

Stouts retained a second expert, but he too needed the requested but not produced documents. By March 18, Stouts located Cole's project engineer in Illinois and subpoenaed him for deposition. The deposition could not be scheduled until March 28. Thus, Stouts were forced to file revised answers without the benefit of their expert's opinions or information gleaned from the project engineer. One of their answers was not complete.

On March 19, 1985, Cole moved to dismiss the complaint claiming, *inter alia*, that "the plaintiffs[']' actions and conduct has or threatens to so delay or obstruct the rights of the Defendant, Cole and Associates,

that the only adequate relief would be dismissal of plaintiff's Complaint." Reciting this language in its order, the court granted the motion that day. The court further ordered Stouts to answer five of Sunrise's twenty-two interrogatories more specifically. Stouts were given until April 1, 1985, to do so.

On March 28, Cole's structural engineer finally appeared for his deposition. Thereat Stouts learned that Cole did possess the disputed and crucial documents as well as an integral yet undisclosed photograph — Cole's counsel had shown them to the engineer two to four weeks earlier, as well as the night before the deposition. Counsel for Sunrise feigned ignorance of the entire matter.

On April 1, 1985, Stouts, still not having obtained these documents, attempted to comply with the court's order. They filed revised answers. On April 2, Sunrise moved to dismiss. At the hearing on the motion, counsel for Sunrise acknowledged that he already possessed the sought after answers to his interrogatories, from Stouts' deposition. He only wanted the answers in interrogatory form to set up a motion for summary judgment. The court granted Sunrise's motion that very day. Indeed, the order entered was identical to the one entered in favor of Cole.

The next day, one of Sunrise's attorneys suffered a pang of conscience. He telephoned Stouts' counsel and disclosed that on March 22 he had obtained copies of the relevant documents from Cole's attorney and that they were in the trunk of his car during the deposition of Cole's project engineer.

The federal question was first fully presented in the Appellate Court by Stouts' Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

I.

DISMISSAL OF STOUTS' COMPLAINT AS A SANCTION FOR NONCOMPLIANCE WITH PRETRIAL DISCOVERY REQUESTS DEPRIVED THEM OF DUE PROCESS; DEFENDANTS WERE NOT PREJUDICED BY STOUTS' ACTS; DEFENDANTS OBSTRUCTED JUSTICE; THE TRIAL COURT NEVER FOUND THAT STOUTS' FAILURE WAS WILLFUL OR IN BAD FAITH; AND STOUTS' COMPLIANCE WAS SUFFICIENT.

In *Societe Internationale v. Rogers,* 357 U.S. 197, 212 (1958), this Court held that Fed. Rule Civ. Proc. 37, which is identical to Indiana Trial Rule 37,

> should not be construed to authorize dismissal of [a] complaint because of a petitioner's noncompliance with a pretrial order when it has been established that failure to comply has been due to inability, and not to any willfulness, bad faith, or any fault of petitioner.

This Court followed this holding in *National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639 (1976), where it reinstated a dismissal of an antitrust action based on the District Court's comprehensive memorandum order, which provided that plaintiffs' failure to timely answer written interrogatories demonstrated "callous disregard of responsibilities counsel owe to the Court and to their opponents" and "flagrant bad faith." On the teaching the of above cases, the dismissal of Stouts' complaint violated basic due process guarantees.

A. Defendants Were Not Prejudiced By Stouts' Conduct.

The trial court never found that Stouts' conduct exhibited willfulness or bad faith. Or that petitioners themselves had any fault in the matter. Simply stated, the trial court never attributed any motive to Stouts' conduct. It found only that defendants' rights had been threatened or delayed. In this regard, the trial court was plainly wrong and its order was an abuse of discretion which deprived Stouts of due process of law.

Defendants already possessed all the information they were seeking through their discovery requests. Counsel for Cole had certified that it was ready for trial years before, in November of 1981. Moreover, Cole had the requested information from Stout's deposition, where he had answered over 1100 questions; Stouts' responses to Cole's first set of interrogatories; Stouts's employer's deposition; and the document deposition of Stout's employer's workers' compensation carrier. Counsel for Sunrise conceded it had the information it sought from Stout's deposition.

Where the information sought in discovery had already been provided, the failure to provide it a *second* time should never have supplied a basis for dismissal. Lesser sanctions were called for. See *Ingalls Shipbuilding Inc. v. United States,* (Fed. Cir., No. 88-1204, September 29, 1988) (It was not unreasonable for plaintiffs to believe that defendant had previously "obtained the bulk of the relevant evidence" so that there was no real prejudice to defendant).

B. Defendants Orchestrated Stouts' Inability to Comply With the Court's Orders.

Stouts have not been able to find a single reported case where a complaint has been dismissed for violation of a discovery order when there was evidence that defendant's tactics amounted to obstruction of justice. Generally, in other cases, the defendant has clean hands. Or, at the very worst, both parties have displayed dilatory tactics. *See e.g. E.E.O.C. v. Carter Carburetor, Div. of ACF Industries,* 577 F.2d 43 (8th Cir. 1978), *cert. denied sub nom. ACF Industries, Inc. Carter Carburetor Division, v. E.E.O.C.,* 439 U.S. 1081 (1979).[2]

Here, on the other hand, defendants repeatedly thwarted Stouts' attempts to obtain necessary information through discovery. Cole falsely denied that it had employed an engineer on the project; Cole falsely represented to the trial court and to plaintiffs' counsel that it did not have the documents sought and needed by plaintiffs in order to answer Cole's interrogatories. And Cole withheld from plaintiffs a crucial and incriminating photograph in response to a production request.

Counsel for Sunrise, immediately upon learning the name of plaintiffs' expert, contacted him and strongly suggested he would lose future work from Sunrise's insurance carrier if he continued as plaintiffs' expert. The Indiana Court of Appeals characterized this as "questionable conduct." It was not. It was pure obstruction of justice.

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[2] In *E.E.O.C. v. Carter,* the fact that both parties had engaged in dilatory tactics was enough to support the reversal of the discovery sanction order.

Equally outrageous, when the deposition of Cole's structural engineer was finally taken, counsel for Sunrise, the only remaining defendant, conveniently "forgot" that the missing documents (subpoenaed for the deposition) were in the trunk of his car, even though both he and Cole's former counsel (who appeared at the deposition as the *witness's* lawyer), had gone over the documents with the witness the night before.

The Indiana Court of Appeals further adopted different standards for Stouts than for defendants with respect to compliance with discovery orders. The opinion makes only a fleeting reference to the early discovery and avoids totally the fact that defendants took more than a year to answer Stouts' interrogatories. And the Court does not even address the refusal by Cole and Sunrise to obey the trial court's orders to comply with Stouts' document production requests, including an order on Cole to produce the disputed documents for an *in-camera* inspection. How could a party or its counsel be more contemptuous? The Court of Appeals also passed over the fact that Sunrise did not even file a set of interrogatories until January, 1985, six years into the litigation — and that Cole's first set was not filed until 1982.[3]

It was a violation of due process guarantees on such a record to reward the defendants with the dismissal of Stouts' complaint.

What the Indiana Court of Appeals opinion does is justify an abuse of the civil justice system by defendants. It condones such gross abuse of the judicial process as the hiding of photographs and other crucial documents. It cloaks with judicial approval intimidating of critical witnesses by parties or their counsel. It sanctions false

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[3] The trial court did not consider these matters at all.

answers to interrogatories and winks at a lawyer's misrepresenting to a *court* and opposing counsel, his knowledge or possession of documents forming the subject matter of crucial discovery. In this setting, it was perverse to hold Stouts guilty of contumacious conduct and reward defendants with a bonus for misconduct that, by comparison, dwarfs any purported defects in Stouts' interrogatory answers to insignificance.

C. The Trial Court Never Found That Stouts Acted Willfully Or In Bad Faith.

It was the Indiana Court of Appeals that took it upon itself to make a finding that Stouts' conduct was willful. However, as this Court held in *National Hockey League,* that was improper: "The question, of course, is not whether this Court, or whether the [Indiana] Court of Appeals, would as an original matter, have dismissed the action; it is whether the [Superior] Court abused its discretion in so doing." 427 U.S. at 642. Moreover, where the sanction of dismissal was at issue, the trial court's discretion was not unfettered. It had to be considered within constitutional limitations. *Societe International v. Rogers, supra.* See also, *Ingalls Shipbuilding Inc. v. United States,* (Fed.Cir., No. 88-1203, September 29, 1988).

No sanction had ever been imposed against Stouts prior to the dismissal of Cole. Accordingly, a lesser sanction should have been attempted. To clear this hurdle, the Indiana Court of Appeals proclaimed that the dismissal of Central Rent-A-Crane, three years earlier, constituted the first sanction against Stouts. And, standing on that illegitimate stepping stone, reached the further erroneous conclusion that a "lesser sanction would have been fruitless."

The dismissal of Central was not properly considered. The trial court never considered it. Stouts did not, and

had no reason to, contest the dismissal of Central. Their theory of Central's liability evaporated during discovery. Stout admitted in his deposition that the crane operator had not bumped the steel or done anything to cause the structure to fall. Statements taken of Stout's co-workers also established that the crane and its operator were not involved. Moreover, Stout's employer testified that the crane operator was Stout's co-employee; he was on C & C's payroll, not Central's, at the time of the accident.[4]

D. Stouts' Revised Answers to Defendants' Interrogatories Were Sufficiently Specific

In any case, while the revised answers to defendants' handful of interrogatories may have been inartfully drafted, stripped of surplusage they provided all the information defendants requested—certainly all they could have provided under the circumstances. This is especially true when considered in light of the other completed discovery, e.g. Stout's lengthy deposition and the exhibits attached to the workers' compensation carrier's document deposition, which defendants already possessed. On such a record, dismissal of Stouts' complaint violated due process.

Cole & Associates

1. Stouts were asked to state their contentions of Cole's negligence. They listed nineteen specific acts of negligence. The trial court conceded the sufficiency of this answer.

2. Stouts were asked to cite statutory violations. This was not feasable without expert assistance. And

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[4] Concededly, Stouts did file a motion to vacate the dismissal order, but they never acted on it. Instead, they moved to withdraw it. This was granted.

where Stouts' first expert was chased off the case and defendants never turned over essential documents for Stouts' second expert's examination, a specific answer here was impossible.

3. Stouts were asked to describe the documents in support of their claim. They listed all that they had in detail, including plans, progress photographs (supplied by Cole), post-accident photographs, a soil report, Cole's specifications for the structure, Cole's daily inspection reports and materials provided by C & C. Cole also already possessed the written statements of Stout's co-workers.

4. Stouts were asked if they were claiming Cole had notice of the negligence. This interrogatory was out of place—obviously taken from a stock set of "notice" interrogatories in a premise and/or municipal liability case.

5. Stouts were asked to detail any mechanical or structural failure connected with the accident. They referred Cole back to their answer to the contention interrogatory. Six of the nineteen specific contentions covered mechanical or structural failure. Additionally, and as Stout had previously testified at his deposition, his general foreman told him after the accident that the anchor bolts were too short for the job.

A. M. Sunrise

1. Stouts were asked to detail any statutory violations. As with Cole, this interrogatory was not susceptible of answer without the documents defendants secreted.

2. Stouts were asked whether all Stout's direction and supervision on the day of the accident came from his employer. Stouts answered "no." This alone was sufficient. But Stouts went further. They stated that Sunrise assumed general responsibility for providing and

inspecting materials, and that Sunrise specifically directed Stout's crew to the work site on the date of the accident with full knowledge that the soil and concrete conditions were unsafe.

3. Stouts were asked whether he was working with anyone but co-employees at the time of the accident. They stated that Stout's employer rented the crane and its operator from Central. Concededly, this answer was clumsy. But it was not in bad faith.

4. Stouts were asked to list the names and addresses of any persons, other than co-employees, with whom Stout was working. They listed Central Rent-A-Crane. Again, clumsy, but not in bad faith.

5. Stouts were asked whether the person giving signals for the movement of the crane was a C & C employee. They answered that no one was signaling the crane operator at the time of the accident. This answer was consistent with Stout's deposition testimony.

In sum and short, dismissal of this case as a sanction for noncompliance with pretrial discovery orders violated Stouts' due process guarantees. The dismissal was inconsistent with the principles advanced in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), where this Court reinstated a dismissal of a cause of action. There, defendant had no responsibility for plaintiff's noncompliance with pretrial requests and the District Court issued a "comprehensive memorandum . . . supporting its order of dismissal." *Id.* at 642. Further, in *National Hockey League,* plaintiffs never contended that defendants actually possessed the sought after discovery. Or that their responses to interrogatories were sufficiently specific. Here, on the other hand, the trial court never supported its orders with any memorandum opinion; it never found bad faith, explained the prejudice to defendants or considered lesser sanctions.

Moreover, defendants here already possessed the discovery they were seeking and they affirmatively kept Stouts from gaining meaningful technical assistance. In such a case, where the Stouts' were personally innocent of any wrongdoing, dismissal of their cause of action violated their due process rights.

II.

DISMISSAL OF STOUTS' COMPLAINT AS A SANCTION FOR NONCOMPLIANCE WITH PRETRIAL DISCOVERY REQUESTS VIOLATED THEIR DUE PROCESS GUARANTEES WHERE THEY WERE PERSONALLY INNOCENT OF ANY WRONGDOING.

The Stouts were further denied due process where their complaint was dismissed as a first sanction for their lawyers' inability to comply with the trial court's discovery orders, even though they themselves were innocent of any wrongdoing.

Dismissal as a first sanction should *never* be imposed upon an innocent client because it is never just. It denies the client his day in court in violation of due process guarantees. U.S. CONST. Amend XIV. And it is unnecessary because the attorney is personally subject to contempt and to disciplinary action for discovery abuse. *Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951, 953. (4th Cir. 1987) ("Justice demands that a blameless party not be disadvantaged by the errors or neglect of his attorney which causes a final, involuntary termination of the proceedings.")

We realize that the right of trial by jury is not absolute; that cases may be dismissed for procedural reasons, *i.e* summary judgment, and, certainly for contempt of court. However, federal policy is that cases ought to be decided on the merits. *Societe Internationale*

v. Rogers, 357 U.S. 197 (1958). Thus, while negligence of the attorney may generally be imputed to the client, the trial court should have tempered this rule under the facts and circumstances of this case. Dismissal was too harsh a sanction. It amounted to a denial of due process.

CONCLUSION

Our constitutional guarantee of due process is so strong that summary dismissal, as occurred in this case, for alleged prejudice foisted by plaintiffs' on defendants, as the trial court ruled — and affirmed by the Indiana Court of Appeals on the different ground that the Stouts, throughout the history of the litigation were contumacious toward the court — is so devoid of support in the record, that the Stouts in this case were denied due process of law. U.S. CONST., Amend XIV. And in this setting the Stouts' right to trial by jury was violated. U.S. CONST., Amend VII. Otherwise, we submit, these guarantees mean nothing. A case could be dismissed for reasons that no reasonable mind would agree with — and a party could be denied all the rights a free society feeds on. This is stark injustice.

Wherefore, Petitioners Joseph Stout and Barbara Stout pray that a writ of certiorari issue to the Supreme Court of Indiana and the Indiana Court of Appeals to review the decision of the Indiana Court of Appeals and the decision of the Supreme Court of Indiana refusing to accept transfer.

Respectfully submitted,

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APPENDICES

IN THE PORTER SUPERIOR COURT
SITTING AT VALPARAISO, INDIANA

STATE OF INDIANA **SS:**
COUNTY OF PORTER

JOSEPH STOUT and
BARBARA STOUT,
Plaintiffs

vs.

A.M. SUNRISE CONSTRUCTION COMPANY, COLE and ASSOCIATES, and CENTRAL RENT-A-CRANE, INC.
Defendants

CAUSE NO:
79-PSC-3321

FILED
IN OPEN COURT
MAR 19, 1985
/s/ ROGER V. BRADFORD
JUDGE PORTER
SUPERIOR COURT

ORDER OF DISMISSAL

This cause comes before the Court on Defendant, Cole and Associates, Motion for Sanctions and Motion for Dismissal.

The Court being duly advised hereby finds that Plaintiffs' conduct has or threatens to so delay or obstruct the rights of the Defendant, Cole and Associates, that the only adequate relief would be dismissal of Plaintiffs' Complaint.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THIS COURT that Plaintiffs' Complaint against the Defendant, Cole and Associates, is hereby dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THIS COURT that there is no just reason for delay, and that this is a final appealable Order.

/s/ ROGER V. BRADFORD
JUDGE, PORTER SUPERIOR COURT

IN THE PORTER SUPERIOR COURT
SITTING AT VALPARAISO, INDIANA

JOSEPH STOUT and
BARBARA STOUT,
Plaintiffs

vs.

A.M. SUNRISE CONSTRUCTION COMPANY, COLE and ASSOCIATES, and CENTRAL RENT-A-CRANE, INC.,
Defendants

CAUSE NO:
79-PSC-3321

FILED
IN OPEN COURT
APR 2, 1985
/s/ ROGER V. BRADFORD
JUDGE PORTER
SUPERIOR COURT

ORDER OF DISMISSAL

This cause comes before the Court on Defendant, A.M. Sunrise Construction Company's Motion for Dismissal.

The Court being duly advised hereby finds that plaintiffs' conduct has or threatens to so delay or obstruct the rights of the defendant, A.M. Sunrise Construction Company, that the only adequate relief would be dismissal of plaintiffs' Complaint.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court that plaintiffs' Complaint against the defendant, A.M. Sunrise Construction Company, is hereby dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that there is no just reason for delay, and that this is a final appealable Order.

/s/ ROGER V. BRADFORD
JUDGE, PORTER SUPERIOR COURT

Joseph STOUT and Barbara Stout,
Appellants (Plaintiffs Below),

v.

A.M. SUNRISE CONSTRUCTION COMPANY, INC.,
and COLE & ASSOCIATES, INC.,
Appellees (Defendants Below).

Joseph STOUT and Barbara Stout,
Appellants (Plaintiffs Below),

v.

C & C IRON, INC. and Biblich Elementary
School, Appellees (Parties pursuant to
T.R. 34(C) for discovery purposes
Below).

No. 65A04-8603-CV-70.

Court of Appeals of Indiana,
Fourth District.

March 30, 1987.

Rehearing Denied May 26, 1987.

YOUNG, Judge.

On March 19, 1985, Joseph and Barbara Stouts' action against Cole & Associates was dismissed because of the Stouts' failure to adequately respond to Cole & Associates' requests for discovery. On April 2, 1985, the Stouts' action against A.M. Sunrise Construction Co., Inc. was dismissed for similar reasons. The Stouts appeal both of these dismissals. One issue is raised on appeal:

> Whether the trial court abused its discretion by dismissing the complaints of Joseph and Barbara Stout against Cole & Associates and A.M. Sunrise Construction Co., as a sanction for the Stouts' failure to comply with the trial court's discovery orders.

We affirm.

On October 3, 1977, Joseph Stout, a construction worker, fell from a beam while trying to secure the beam to a steel column. As a result of injuries suffered in the fall, Stout was rendered a paraplegic. On October 3, 1979, Stout filed an action against A.M. Sunrise, Cole & Associates, and Central Rent-A-Crane, Inc. seeking damages for the injuries suffered in the fall. His wife, Barbara Stout, sought damages for loss of consortium.[1]

Following the instigation of the action, numerous discovery motions were filed between the plaintiff and defendants, between the defendants and other third parties, and between the various defendants. We will limit our discussion to the motions and events necessary to our opinion.

On March 2, 1982, Central Crane filed a supplemental set of interrogatories on the Stouts. On May 26, 1982, Central Crane filed a motion for sanctions or in the alternative to compel discovery on the Stouts in order to obtain answers to those interrogatories. On June 11, 1982, Central Crane filed a motion asking the trial court to either set the matter for hearing or give Central Crane a summary ruling because of the Stouts' failure to respond. On September 29, 1982, the trial court ordered the Stouts to make substantive responses to Central Crane's interrogatories within twenty days or suffer dismissal of their claims against Central Crane. On October 21, 1982, Central Crane filed its Motion to Dismiss. The trial court granted Central Crane's motion and dismissed with prejudice the complaints of Joseph and Barbara Stout against Central Crane for their failure

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[1] C & C Iron, Inc. was subsequently brought into the action by way of an indemnity claim filed by A.M. Sunrise. Although C & C Iron filed a brief in this appeal, it is not directly involved and, therefore, is not discussed in this opinion.

to respond to the discovery requests. Central Crane's dismissal is not a subject of this appeal.

During this same time period, Cole & Associates also sought discovery from the Stouts. On May 21, 1982, Cole & Associates filed ten interrogatories on the Stouts and requested the trial court to order the Stouts to respond within thirty days. The trial court entered the order; however, the Stouts filed no answers. On September 20, 1982, Cole & Associates filed a motion for sanctions or alternatively requested the trial court to compel answers to the interrogatories propounded to the Stouts. Our review of the record fails to disclose any order entered on this motion. Following these motions and the dismissal of Central Crane, there appears to have been no further action in the case until March of 1984.

On May 22, 1984, Cole & Associates filed a motion for sanctions with respect to the interrogatories it had filed on the Stouts on May 21, 1982. The trial court ordered the Stouts to respond by June 13, 1984 or suffer sanctions. On June 11, 1984, new counsel appeared for the Stouts and requested an additional twenty days to respond to Cole & Associates' discovery requests. On June 24, 1984, the Stouts still had not filed answers to the interrogatories and were ordered to do so within fifteen days. Answers were filed on August 8, 1984.

On August 15, 1984, Cole & Associates filed an additional set of seventeen interrogatories on the Stouts and requested the trial court to order the Stouts to respond within thirty days. The court entered the order. On September 11, 1984, the Stouts requested and received an additional thirty days to respond. On December 14, 1984, having received no answers, Cole Associates filed a motion to compel. The Stouts were ordered to respond within fifteen days or suffer sanctions. On January 2, 1985, the Stouts asked for additional time to respond and were given until January 12, 1985. Their answers were

filed on January 8, 1985.

On January 15, 1985, Cole & Associates filed a motion to compel more complete answers. Cole & Associates had requested information concerning the Stouts' specific contentions, expert witnesses and workers present at the time of the accident. The Stouts' answers to these questions were evasive and non-responsive. On February 22, 1985, the Stouts were ordered to provide responses to five of Cole & Associates' interrogatories and to provide the names and addresses of the Stouts' expert witnesses by March 4, 1985 or suffer dismissal. On March 1, 1985, the Stouts requested an extension of time to respond to the interrogatories on the bases that their expert witness had withdrawn due to a conflict of interest[2] and that they were still seeking certain materials needed to respond to the interrogatories.[3] The trial court granted

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[2] The Stouts strenuously argued that the withdrawal of their expert was the result of questionable behavior on the part of one of the defendants' attorneys. Defense counsel apparently contacted the Stouts' expert and informed him of a conflict. Defense counsel did not discuss the problem with plaintiffs' counsel prior to contacting the expert.

[3] During this same time period, the Stouts were filing various discovery requests on both defendants and non-parties to obtain information they believed necessary to answer the interrogatories propounded to them. On February 6, 1985, the Stouts had also filed a motion to compel more complete answers to discovery requests that had been filed in May, 1980. The trial court, however, found that any information sought by the Stouts affected only one answer in each of the defendants' requests and did not excuse the Stouts' failure to file specific answers. The Stouts also asserted that the defendants had deliberately withheld the documents in question. We merely note that the issue was hotly contested and fully presented to the trial court. The facts before the trial court support its ultimate conclusion. No abuse of discretion occurred in the trial court's weighing of these factors in determining the sanction to impose on the Stouts.

the Stouts an extension of time up to March 18, 1985 to respond to Cole & Associates' interrogatories. The Stouts filed their answers on that date and Cole & Associates filed a motion to dismiss the next day. The answers filed by the Stouts failed to provide information on their expert witness[4] or to provide specific information on some of the other interrogatories. As a result, the trial court dismissed with prejudice the Stouts' complaint against Cole & Associates on March 19, 1985.

The events leading to the dismissal of the complaints against A.M. Sunrise are similar. A.M. Sunrise filed interrogatories on the Stouts on January 23, 1985. Answers to these interrogatories were filed on March 18, 1985. However answers to several of the interrogatories were evasive and non-responsive. On March 19, 1985, the trial court ordered the Stouts to file more specific answers to five of the twenty-two interrogatories by April 1 or suffer dismissal. Supplemental answers were filed on April 1. On April 2, 1985, A.M. Sunrise moved for dismissal based on the inadequacy of the Stouts' responses. That same day, the trial court dismissed with prejudice the Stouts' complaints against A.M. Sunrise. At the hearing on the motion to dismiss, the trial court stated that it was granting A.M. Sunrise's motion to dismiss because the supplemental answers "add nothing more than the originals did and provide no more specifics. Therefore, the Court's order has not been complied with and the Court is going to grant the order of dismissal." (R.825) At a subsequent hearing on the Stouts' motion

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[4] The Stouts responded that only one expert had been consulted and he had resigned because of a conflict. However, at a later date, the Stouts' counsel acknowledged that he had contacted and was working with another expert at that time. It is also notable that the Stouts did not meet with an engineering expert until 1985 although the action had been on file since October, 1979. (Affidavit of Kevin K. McQuillan, R. 21)

to set aside the dismissals, the trial court noted that only one interrogatory from each defendant involved documents that the Stouts were attempting to obtain from the defendants and non-parties. The remainder of the questions had nothing to do with documents and could have been answered by the Stouts. Therefore, the trial court denied the Stouts' motion to set aside the dismissals. This appeal followed.

Trial Rule 37 permits trial courts to impose various sanctions upon parties failing to comply with discovery. The sanction may range from an award of expenses to an entry of dismissal or default judgment. *Pitts v. Johnson County Dept. of Public Welfare* (1986), Ind.App., 491 N.E.2d 1013, 1014-15. The sanction to be imposed is left to the sound discretion of the trial court. *Id.* In *Chrysler Corp. v. Reeves* (1980), Ind.App., 404 N.E.2d 1147, 1154, this court stated in a footnote that "the sanction of default or dismissal is never appropriate without entry of a lesser sanction first." We have since modified our approach to the use of the sanction of dismissal for failure to comply with discovery orders. While we still recognize that "the opportunity to be heard is a litigant's most precious right and should be sparingly denied," *id.* at 1153, we will not condone disregard for the trial court's orders. It is therefore now "settled in this jurisdiction that lesser sanctions should be imposed on parties unless there has been contumacious disregard of the court or lesser sanctions have not been effective." *Pitts supra* at 1015.

In the present case, the Stouts evinced a pattern of blatant disregard for the trial court's orders concerning

discovery.[5] They completely failed to respond to court orders compelling them to answer Central Crane's discovery requests in 1982. As a result, their actions against Central Crane were dismissed. Even after suffering this dismissal, the Stouts failed to comply with the court's orders compelling them to file specific responses to Cole & Associates' interrogatories. By the time the Stouts' final answers were due to A.M. Sunrise, they had suffered the dismissal of their complaints against both Central Crane and Cole & Associates. Yet their answers to A.M. Sunrise were still insufficient and failed to provide pertinent information concerning expert witnesses and the factual basis for their claims. At the time the claims against Cole & Associates and A.M. Sunrise were dismissed, the action had been on file for approximately six years and was scheduled to go to trial on July 8, 1985. Yet, the Stouts still could not specifically answer many of the questions because "investigation continues." It is notable that some of the information requested was or should have been within the personal knowledge of Joseph Stout, e.g. who he was working with

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[5] The Stouts assert that their failure to respond was excusable. First, as previously discussed, they assert that it was due in part to the defendants and third-parties' failure to produce certain documents. Second, also as previously discussed, they point out that they lost their expert witness when defense counsel contacted the witness and informed him of a possible conflict of interest. Third, they assert that the delay was caused in part by Joseph Stout suffering a heart attack during this time period. In addition, the Stouts argue that their new trial counsel had shown a good faith effort to comply with the discovery requests. The Stouts assert that the trial court failed to properly weigh these factors when deciding the sanction to be imposed. We disagree. Our review of the record reveals no abuse of discretion in the trial court's decision that dismissal was an appropriate sanction even when considering all of these events. The trial court's reasons for imposing the sanction of dismissal were well-supported by the facts and circumstances surrounding this case.

the day of the accident. Under these circumstances, we find the sanction of dismissal appropriate. A lesser sanction apparently would have been fruitless considering the Stouts' failure to correct their response patterns even after suffering the dismissal of their claims against Central Crane. Under the facts of this case, the trial court's conclusion that the rights of the defendants had been obstructed was well-founded. We, therefore, affirm the dismissal of the actions against both Cole & Associates, Inc. and A.M. Sunrise Construction Co., Inc.

MILLLR, J., concurs.

SULLIVAN, J., concurs as to dismissal of complaint against Cole & Associates, Inc., but dissents as to dismissal of complaint against A.M. Sunrise Const. Co., Inc.

Supreme Court of Indiana

CLERK OF THE SUPREME COURT,
COURT OF APPEALS AND TAX COURT

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Cause Number
64A04-8603-CV-00070
LOWER CAUSE
79-PSC-3321

JOSEPH & BARBARA STOUT -V- A.M. SUNRISE CONST. CO., ET AL

You are hereby notified that the SUPREME COURT has on this day 8/23/88

APPELLANTS' PETITION TO TRANSFER IS HEREBY DENIED. RANDALL T. SHEPARD, CHIEF JUSTICE

ALL JUSTICES CONCUR, EXCEPT DEBRULER & DICKSON, J.J., WHO VOTE TO GRANT TRANSFER.

WITNESS my name and the seal of said Court,

This 23RD day of AUGUST, 1988

/s/ DAN HEISER

Clerk Supreme Court, Court of Appeals and Tax Court